86-659

Supreme Court, U.S.
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No.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1986

HUGH A. REYNOLDS, AND THOMAS G. PERRY,

Petitioners,

V.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

WHETHER ALLOWING THE GOVERNMENT TO USE "SECRET SETTLEMENTS" TO MITIGATE THE PENALTY OF REMOVAL IMPOSED AGAINST SOME, BUT NOT ALL, EMPLOYEES FIRED FOR STRIKING AGAINST THE FEDERAL GOVERNMENT ABROGATES THE EQUAL TREATMENT GUARANTEES OF THE CIVIL SERVICE REFORM ACT AND THE UNITED STATES CONSTITUTION.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reprinted in the Appendix to this petition and is an unpublished decision of the Court. The opinions of the United States Merit Systems Protection Board are reprinted in the Appendix to this Petition. The Bergh v. Department of Transportation, FAA, decision on which the Court below based its decision in this case is also reprinted in the Appendix.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on July 18, 1986 and the jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS

5 U.S.C. Section 2301(b):

> Federal personnel management should be implemented consistent with the following merit system principles...
>
> (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.
>
> (8) Employees should be
>
> (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes...

5 U.S.C. Section 7703(c):

> In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency actions, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...

5 U.S.C. Section 7311:

> An individual may not accept or hold a position in the Government of the United States...if he ... (3) participates in a strike ... against the Government of the United States...

STATEMENT OF THE CASE

Petitioners, air traffic controllers employed by the U. S. Department of Transportation, Federal Aviation Administration, [hereinafter FAA], were fired for striking against the government in August 1981. Before the Merit Systems Protection Board and Court of Appeals for the Federal Circuit, Petitioners, among other arguments, alleged the removal for striking was in violation of the equal treatment guarantees found in the Merit System Principles of the Civil Service Reform Act and the Fifth Amendment Equal Protection Clause of the U.S. Constitution. The claimed

denial of equal treatment was based upon the Government's entering "secret settlements" which mitigated the penalty of removal imposed against some, but not all, of the employees who were fired for striking in August 1981. The Court of Appeals and Merit Systems Protection Board rejected Petitioner's contentions and denied Petitioner's request to reopen the record for additional discovery and admission of evidence regarding the settlements with similarly situated employees.

The only issue presented in this case which had not previously been decided by the Court of Appeals in other air traffic controller appeals was: Whether the record should be reopened for discovery and introduction of evidence which might prove the government violated

petitioner's constitutional and statutory rights to equal treatment for similar offenses when it entered into secret settlements with a number of controllers fired for striking and reduced their removal to a suspension without pay for being Absent Without Leave (AWOL). The Court of Appeals denied the appeal based upon its July 2, 1986 ruling in Bergh v. Department of Transportation, FAA, 794 F.2d 1575. (Appendix E). In Bergh the Court basically ruled that the requirements of the Civil Service Reform Act of 1978 guaranteeing equal treatment of employees do not apply to settlement agreements which reduce penalties previously imposed. The Court concluded that the law favors settlement of cases and overlooked the prior law requiring the government to prove by a preponderance of the

evidence that there were legitimate reasons for disparate treatment once an employee-appellant alleges disparate treatment in comparison with other employees.

The facts which first gave rise to Petitioner's claim of disparate treatment was counsel's discovery in November 1982 that a number of controllers who were fired and had appealed their firings to the MSPB had their appeals dismissed without explanation. Subsequently, a Freedom of Information Act lawsuit filed against the FAA in the United States District Court for the Western District of Tennessee, Civil Action No. 83-2315-HA, W.D. Tenn. (1983),(reported at 580 F.Supp. 984 (1983), resulted in a court order denying the government's claim of exemption of the settlements from the

FOIA. Subsequent production of 123 redacted files by the government verified that federal employees fired for striking had their removal reduced to a suspension without pay for being Absent Without Leave after they appealed their removal to the MSPB. Reasons for the lesser penalties being imposed against these strikers have not been disclosed by the government. The request to reopen the record and allow further discovery and introduction of evidence relating to these settlements was denied upon a ruling that the evidence was not relevant. The Court below reviewed the MSPB decision pursuant to 5 U.S.C. Section 7703. The MSPB review of Petitioner's appeal of the termination decision was pursuant to 5 U.S.C. Section 7513(d) and Section 7701.

REASONS FOR GRANTING WRIT

The Court of Appeals for the Federal Circuit decided a question of law which affects the rights of every federal government employee under the Civil Service Reform Act of 1978 and which has not, but should be, settled by this Court. The Court denied requests to reopen the record below for discovery concerning alleged "secret settlements" entered between the FAA and certain other air traffic who had, like Petitioners, been fired for striking in August, 1981. The Court denied the request based upon its opinion in Bergh v. Department of Transportation, FAA, wherein the Court ruled in effect that disparate treatment in discipline which results from settlement of cases before the Merit Systems Protection Board does

not violate the prohibitions against disparate treatment in discipline found in the Civil Service Reform Act and the United States Constitution.

I. FAILURE TO GRANT THE WRIT WILL RENDER THE EQUAL TREATMENT GUARANTEES OF THE CIVIL SERVICE REFORM ACT AND THE U. S. CONSTITUTION MEANINGLESS.

The decision of the U.S. Court of Appeals for the Federal Circuit in this case, relying on its decision two weeks earlier in Bergh v. Department of Transportation, FAA, 794 F.2d 1575 (July 2, 1986), has the effect of reversing the prior rule of law which required government agencies to prove by a preponderance of the evidence that there were legitimate reasons for disparate treatment of employees for similar alleged misconduct. Woody v.

General Services Administration, 6 MSPR 468, 488 (1981); Douglas v. Veterans Administration, 5 MSPR 280, 306-7 (1981); Bivens v. TVA, 8 MSPR 458, 463 (1981); Washington v. TVA, 8 MSPR 27, 29 (1981); Filip v. Veterans Administration, 15 MSPR 329, 333 (1983); Drummer v. GSA, 22 MSPR 432, 434 (1984); Wilson v. U.S. Postal Service, 21 MSPR 490 (1984).

The Court in Bergh concluded that

> Woody and Douglas, however, are inapposite because they deal solely with the question whether the penalty the agency selected was proper. The alleged disparate treatment here, however, does not involve any difference in the penalty imposed upon different employees -- all the air traffic controllers involved were removed -- but turns upon the propriety of the Administration's settling some of the cases before the Board by reinstating some controllers, and not explaining the reasons why it also did not enter into like settlements with the petitioners.

Appendix E. In addition, the Court concluded that the explanation of counsel for the agency in its brief to the Court of why it reduced the removal penalty for some controllers met the Government's burden and that settlements were to be encouraged. If these rulings of the Court of Appeals are allowed to stand, then the government in the future will be allowed to routinely make "end runs" around the equal treatment guarantees of the Civil Service Reform Act of 1978 and the equal protection guarantees of the U.S. Constitution. Obviously, to avoid the Woody and Douglas burden of proof when disparate treatment is alleged by an employee who has been disciplined, all the government will have to do is provide equal penalties initially and then enter secret settlement the next day

with the favored employee reducing or eliminating the penalty imposed.

The intent of the Congress and the President of the United States in the enactment of the landmark Civil Service Reform Act of 1978 was mainifestly clear: to remedy serious defects in the Nation's Civil Service System, especially continuing abuses of the "merit system" first set up by the Pendleton Act of 1883. As the Court of Appeals for the Federal Circuit stated in Schapansky v. Dept. of Transp., FAA, 735 F.2d 477, 485 (1984), "Ideal justice, and government personnel regulations, envisage equal treatment of persons similarly situated". To ensure that this ideal justice is attained the Civil Service Reform Act was amended in 1978 to correct some of its earlier weaknesses.

Remedial legislation regulating the conditions of employment (like the Civil Service Reform Act and the Fair Labor Standards Act) is to be liberally construed "in favor of the workers whom it was designed to protect" with an eye toward carrying out the intent of Congress and the will of the people in passing enactments to remedy past abuses. Wirtz v. Ti Ti Humus Company, 373 F.2d 209 (4th Cir. 1976), citing Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

The recent MSPB BREAKING TRUST report concluded that the merit system principles and prohibited personnel practices, "Taken together ... constitute a sort of 'Magna Charta' or constitution of federal employment law. BREAKING TRUST, Prohibited Personnel Practices in the

Federal Service, Director's Monograph, U. S. Merit Systems Protection Board Office of Merit Systems Review and Studies, February 1982 at 1, hereafter cited as BREAKING TRUST. That "Magna Charta or constitution" has been violated through the secret settlements and now sanctioned by the Court's decision below.

While the U. S. Government gave the impression to the world that all striking air controllers who failed to return to work by their deadlines were permanently fired, that same Government gave favorable treatment and special consideration to at least 123 air traffic controllers by reintstating them after they went on strike, were fired for doing so, and had appealed their firings to the MSPB. Norwood v. FAA, 580 F. Supp. 984 (W.D. TN. 1983). For the 123 the

penalty of removal for striking was reduced to a suspension without pay for being Absent Without Leave and implemented through secret settlement agreements. Id.

The "secret settlements" were learned of by Petitioner's counsel for the first time in November 1982 when he became aware of the dismissal, without explanation, of several cases pending before the MSPB. Each of these cases involved air traffic controllers fired for striking in August 1981. They were fired only after having had an opportunity to respond to the charges of striking and having had those defenses rejected by the FAA. That the secret settlements were entered was later verified through a Freedom of Information Act lawsuit filed by counsel for Petitioner in the United States

District Court for the Western District of Tennessee. Norwood v. Federal Aviation Administration, 580 F. Supp. 994 (W.D.TN. 1983). The Honorable United States District Court Judge Odell Horton granted a motion for partial summary judgment for the Plaintiff in that case, rejecting all of the Government's claims that these settlements were exempt from disclosure under the Freedom of Information Act and ordering that the Government release the inculpatory documents based on there being a "strong public interest in ascertaining whether the agency authorized to deal with the Nation's aviation safety handled matters surrounding the strike in a fair and consistent manner." (emphasis added) Id.

Petitioner suggested below that

secret settlements in fedeal personnel management violate two of the merit principles, to wit:

> Federal personnel management should be implemented consistent with the following merit system principles:...
>
> (2) All employees and applicants for employment should receive **fair and equitable treatment in all aspects of personnel management** without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and **with proper regard for their privacy and constitutional rights**
>
> (8) Employees should be
>
> (A) **protected against arbitrary action, personal favoritism,** or coercion for partisam political purposes.

5 U.S.C. 2301. (Emphasis added) Under 5 U.S.C. § 7701(c)(2)(B), any agency personnel decision, even assuming arguendo it is supported by a preponderance of the evidence, must be reversed where the employee shows that

the decision was based on any prohibited personnel practice. Clearly, agencies act illegally, arbitrarily and capriciously when they dispense unequal penalties for equal offenses. In one case, a United States Tennessee Vally Authority employee was fired for possession of a firearm on TVA property -- while other TVA employees found with firearms were merely given warning letters. The Merit Systems Protection Board held in that case that where rules are inconsistently applied, agency decisions to remove employees will be overturned. Washington V. Tennessee Valley Authority, 8 MSPR 27, 29 (1981).

In another MSPB-TVA case involving illegal, arbitrary and capricious discrimination in the form of unlike penalties for like offenses, two employees were fired for removing

TVA equipment, for unauthorized use of TVA equipment, and for other offenses. Before the MSPB, the fired TVA employees produced unrebutted evidence that other similarly situated employees were given less severe penalties. The Merit Systems Protection Board ordered the less severe 60 day suspension be imposed instead of the unequal and discriminatory firing. Bivens and Marshall v. Tennessee Valley Authority, 8 MSPR 458 (1986). The Board continued to follow this rule in Filip v. VA, 15 MSPR 329, 333 (1983); Drummer v. GSA, 22 MSPR 432, 434 (1984); Wilson v. U.S. Postal Service, 21 MSPR 490 (1984).

Because the MSPB denied the request for discovery of and thereafter introduction of evidence of unequal treatment inherent in the 123 being

rehired through secret settlements, Petitioner was not afforded the same procedural rights and remedies as fellow U. S. Government employees (e.g. Washington, Bivens and Marshall). As a result Petitioner was denied a hearing on the unequal treatment by which they have been denied their rights under the Civil Service Reform Act and the Equal Protection provisions in the United States Constitution.

The federal courts are not strangers to similar cases of outrageous and invidious discrimination. For example, in the landmark Constitutional law case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886), San Francisco required by ordinance that all hand laundries be in brick or stone buildngs (rather than in cheaper frame

buildings) unless there was special permission granted by the Board of Supervisors. Chinese immigrants were denied permission for a variance, were convicted of violation of the city ordinance, and were sentenced to imprisonment. The United States Supreme Court held the Equal Protection guarantees of the Constitution were violated by such discrimination.

In the case at hand, the Government avoided compliance with the Yick Wo rule by concealing the evidence that will prove denial of equal treatment under the law and the Court of Appeals for the Federal Circuit decision sanctions that concealment. The secrecy in the settlements implies that the reason some strikers were reinstated was because some have more influence than

others at FAA.

Under the Civil Service Reform Act, at 5 U.S.C. 7701(c)(2), no Merit Systems Protection Board decision may be upheld where the employee or applicant

> (A) shows harmful error in the application of the agency's procedures in arriving at such decision;
>
> (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or
>
> (C) shows that the decision was not in accordance with law.

Petitioner contended below that (A) they have been victims of harmful error in exclusion of materially relevant evidence of unequal treatment, that (B) the personnel decisions affecting them were tainted with prohibited personnel practices [violations of 5 U.S.C. §§ 2301(b)(2)

and (b)(8)(a) inherent in the secret settlement] and that (C) the decision was not in accordance with the law and administrative decisions of the MSPB relating to unequal penalties for equal offenses.

The language of the statute requires only one of these three elements be present for a decision to be overturned. In this case, all three elements were present, providing the Court below with strong and compelling grounds for reopening the record in the interest of justice. If the Civil Service Reform Act is to be "treated as a working instrument of government and not merely as a collection of English words," United States v. Dotterwich, 320 U.S. 277, 280, 64 S.Ct. 134, 136 (1943), unequal treatment of Government employees who commit similar offenses must be

remedied. Only in a new hearing will Petitioner's rights be protected through the introduction into evidence of the 123 secret settlements and other evidence of unequal treatment. Allowing the ruling of the Merit Systems Protection Board and Court of Appeals to stand would encourage government law breaking through the new tool of "secret settlements" the day after "equal" penalties have been imposed.

Petitioners have been wronged, because information about possible illegality, irregularity and fraud in the settlement of the claims of a minority of air traffic controllers has been kept out of the consideration of Petitioner's case. Petitioners sought to have their cases remanded with an order to allow them an opportunity to enage in further

discovery about the secret settlements. The Civil Service Reform Act very specifically gives federal courts this power to right wrongs:

> The court shall review the record for the purpose of determining whether the findings are in accordance with law, and whether the procedures required by statute and regulations were followed ... the findings of the Board are conclusive if supported by evidence in the record. **If the court determines that further evidence is necessary, it shall remand the case to the Board.** The Board, after such further proceedings as may be required, may modify its findings, and shall file with the court the record of such proceedings. The findings of the board are conclusive if supported by the evidence in the record as supplemented.

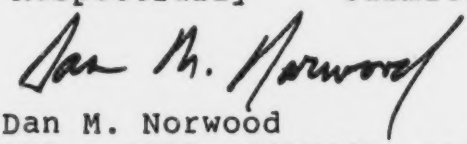
5 U.S.C. 7702. [Emphasis added] A remand on this crucial Civil Service Reform Act and constitutional law issue is indeed a very small price to

pay for assuring the honesty and integrity of the federal personnal system.

CONCLUSION

If we are to reach the "ideal justice" this Court referred to in Schapansky, Id. at 485, "secret settlements" of federal employee appeals of disciplinary actions must be prohibited and the decision below should be reviewed and reversed. For these reasons, Petitioners request the Court grant the writ of certiorari.

Respectfully submitted,



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October 1986

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was sent by regular mail, postage prepaid, this 16th day of October, 1986.

Solicitor General
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Washington, D.C. 20530

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Dan M. Norwood

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

HUGH A. REYNOLDS, and THOMAS G. PERRY,	*	
	*	Appeal No. 85-1121
Petitioners,	*	
v.	*	MSPB Docket Nos. ATO75282F0674
DEPARTMENT OF TRANSPORTATION, FAA,	*	ATO75282F1471
Respondent.	*	

DECIDED: July 18, 1986

Before FRIEDMAN, Circuit Judge, BENNETT, Senior Circuit Judge, and BISSELL, Circuit Judge.

PER CURIAM.

DECISION

The decisions of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, are affirmed.

OPINION

1. Reynolds

Petitioner Reynolds brings this appeal asking this court to reopen the record below for discovery concerning certain alleged "secret settlements" entered into between the FAA and certain other air traffic controllers with situations allegedly similar to Reynolds. Assuming, without deciding, that Petitioner properly preserved this issue before the board, which did not discuss it in the opinions below because it had earlier ruled that it was not relevant; the recent opinion of Bergh v. Department of Transportation, FAA, App. No. 85-1102 (Fed. Cir. July 2, 1986), decides this discovery issue and prevents us from

granting Reynolds the requested relief.

2. Perry

Petitioner Perry raises the same "secret settlements" issue as Reynolds, and we think Bergh adequately disposes of that part of Perry's appeal. However, Perry also argues that he was on vacation and did not participate in the strike. Perry also argues that his supervisor deliberately failed to let Perry know about the amnesty program when Perry specifically told him of his concerns about being charged with a felony. Perry also argues that this supervisor confused him as to his return deadline while he was on vacation and that he had little if any opportunity to learn of his deadline elsewhere.

Under Schapansky v. Department of Transportation, FAA, 735 F.2d 477

(Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984), Perry's argument that he was on vacation and had no intention to strike would, if proven, show that he lacked the necessary intent to strike and would show that he had not refused his services in concert with others. The government has entirely failed to respond to this argument.

However, on appeal, the burden is on Perry to prove to us that the board made some error in fact or in law.

The presiding official found in Perry's case that

> Although [Perry's supervisor] did not dispel [Perry's] concern about possible felony charges which was expressed during their second telephone conversation on August 3, 1981, I find that such does not justify [Perry's] subsequent absences. This would be particularly true with respect to [Perry's] August 5, 1981

> absence because the undisputed evidence shows that during the evening of August 4, 1981, after [Perry] had missed a shift assignment, [Perry's supervisor] again talked with [Perry] and notifed him that he was needed at work for his August 5, 1981 shift assignment. Thus, [Perry] was given clear notice that he could return to work on August 25, 1981, and was in fact, solicited to return on that date. Because [Perry] did not report for work as scheduled and has offered no evidence why he did not or could not report, I find that he has not rebutted the agency's prima facie case.

Perry's arguments here concerning his vacation are apparently an attempt to show that he had no intent to strike. However, the facts, which Perry has failed to show are not supported by substantial evidence, indicate that errespective of any vacation, Perry was in contact with his supervisor and was told to report for his due date of August 5. Perry has offered no clear reason for his failure to report on August 5,

although some statements in his brief may be taken to be an argument that his failure to report on August 5 was due to confusion created by his supervisor concerning his status. We have considered the record and Perry's brief and to the extent that "confusion" is being put forward as his excuse for failing to report to work on August 5, we think that Anderson v. Department of Transportation, FAA, 735 F.2d 537, 539-40 (Fed. Cir.), cert. denied, 105 S.Ct. 432 (1984), and Adams v. Department of Transportation, FAA, 735 F.2d 488, 490 (Fed. Cir), cert. denied, 105 S. Ct. 432 (1984), are precedents against Perry's position.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

RAYMOND E. BADER, ET AL.	*	CASE NO. *ATO75281F1388
HUGH A REYNOLDS,	*	CASE NO. *ATO75281F0674
THOMAS G. PERRY and	*	CASE NO. *ATO75281F1471
ROGER DE VALL	*	CASE NO. *ATO75281F1817
	*	
v.	*	
	*	
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,	*	

OPINION AND ORDER

This case is before the Board on petitions by the agency and by appellant Roger W. DeVall. 1 The agency asserts in its petitions that the previsind official erred in finding that it suspended appellants during their removal notice periods when it maintained them in a nonduty, nonpay status from the dates of their removal proposal notices until the

effective dates of their removals. Upon consideratin of the agency's petitions, the Board hereby GRANTS review.

The Board held in Martel v. Department of Transportation, MSPB Docket No. BNO75281F0558 at 6-7, 11-12 (April 25, 1983), that in order to meet his burden of establishing jurisdiction over an alleged suspension during the notice period under 5 C.F.R. Section 1201.56(a)(2), an appellant must prove by preponderant evidence that the action was involuntary and disciplinary in nature, and that the employee was ready, willing, and able to work during the period of time in question. The last of the three criteria cannot be established without evidence tht the appellant contacted an agency official with

decision-making authority, in person or otherwise, and unequivocally notified the official that he was ready, willing, and able to return to work. Id. at 11. Such a showing effectively establishes, without additional evidence, that the agency's action or inaction in continuing to maintain appellant in a nonduty, nonpay status during the notice period was involuntary on appellant's part and disciplinary in nature on the agency's part. Id. at 12.

In the instant cases, a thorough review of the records shows no evidence that any appellant had contacted an agency official and unequivocally notified such official that he was ready, willing and able to work. The Board finds that appellants were not entitled to be placed on a duty and pay status during the notice period.

Accordingly, the initial decisions dated January 13, 1983 and January 25, 1983 are REVERSED as to the presiding official's finding that the agency suspended appellants from the dates of their respective notices of proposed removals through the effective dates of their removals.

Petitioner Roger W. DeVall asserts that he has additional evidence which the presiding official declined to review because it was not filed before the record closed. The additional evidence consists of a letter from the appellant to his Congressman dated approximately one month after the hearing, a character reference letter from a co-worker and the Congressman's response letters. The contents of the letter to the Congressman are elaborations of his defenses. Inasmuch as the appellant

had an opportunity at the hearing to elaborate on his defenses, the letters filed by the appellant do not constitute new and material evidence that, despite due diligence, was not available when the record was closed. Avansino V. U. S. Postal Service, 3 MSPB 308, 310 (1980).

Moreover, since the arguments made in the appellant's letter to the Congressman do not meet the criteria for review set forth at 5 C.F.R. Section 1201.115 2 , the Board hereby DENIES the petition.

This is the final ordedr of the Merit Systems Protection Board in these appeals. The initial decisions shall become final five (5) days from the date of this order. 5 C.F.R. Section 1201.113(b).

The appellants are hereby notified of the right under 5 U.S.C.

Section 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N. W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

_____ _____

Date Robert E. Taylor
Secretary

Washington, D. C.

_____

FOOTNOTES

1. These cases involved the consolidation of appeals of 170 former air traffic controllers (see attached list) employed in the Memphis, Tennessee area. Although all appeals were consolidated for hearing, the presiding official issued three initial decisions. one for each of the facilities in Memphis, both entitled Bader, et al, dated January 13, 1983, and a single decision issued on January 25, 1983 for Hugh A. Reynolds and Thomas G. Perry, who were employed in control towers near Memphis, The agency filed separate petitions for review from each of the three decisions. In addition, petitioner Roger W. DeVall, one of the air traffic controllers whose appeal was consolidated sub nom, Bader, et al, filed a petition from the initial decision affirming the agency's removal action. The petitions for review are consolidated pursuant to 5 U.S.C. Section 7701(f)(1).

2. The Board has resolved the issues raised in the letter by the appellant in the following cases: Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 at 6 n. 2 and 10-11 (October 28, 1982) prima facie case of strike participation and reasonableness of the penalty); Anderson v. Department of Transportation, MSPB Docket No. SL075281F0347 at 7-8 (April 25, 1983) (showing of confusion with respect to the "deadline shift" does not rebut the agency's prima facie case of strike participation); Sofio v. IRS, 7 MSPB 493 (1981) (appellant's

disagreement with the manner in which his attorney handled his case is not sufficient ground for review).

UNITED STATES OF AMERICA
ERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

R. E. BADER, et al	*
	*
Appellant,	*
	*
v.	*
	*
DEPARTMENT OF TRANS-PORATATION, FEDERAL AVIATION ADMINISTRATION,	*
	*
Agency.	*

ORDER

By a motion received on December 3, 1982, the attorney for the above-referenced appellants requests that the record be re-opened for the development of evidence concerning several recent settlements of appeals from former Air Traffic Controllers who were removed as the result of the 1981 strike against the agency.

The matter of recent settlements not being relevant to the instant consolidated appeal, the motion is DENIED.

S. F. VESSER
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

IN THE MATTER OF:	*	
	*	
HUGH A. REYNOLDS,	*	
THOMAS C. PERRY,	*	
Appellants,	*	DECISION NUMBER:
	*	ATO75282F0674
v.	*	DECISION NUMBER:
	*	ATO75281F1471
DEPARTMENT OF	*	
TRANSPORTATION,	*	
FEDERAL AVIATION	*	
ADMINISTRATION,	*	
	*	
Agency.	*	

INTRODUCTION

By separate petitions, the appellants submitted timely appeals to the Regional Offices of the Merit Systems Protection Board. The appeals are from administrative actions taken by the Federal Aviation Administration (FAA) which resulted in the removal of each appellant from the position of Air Traffic Control Specialist at an Air Traffic Control Tower.

Because the issues are substantially the same, the appeals have been consolidated. 5 U.S.C. §7701(f)(1); 5 C.F.R. §1201.36(a)(1). Each appellant requested a hearing and a hearing on the consolidated appeals, which included the appeals of other former air traffic controllers, was held on October 18, 19, 20 and 21, 1982 at Memphis, Tennessee. [1]

JURISDICTION

At the time of the removal action, each appellant was an employee as defined by 5 U.S.C. §7511(a)(1)(A) and a removal is an action covered by 5 U.S.C. §7512. Accordingly, the appeals were accepted for adjudication on the basis that they are within the appellate jurisdiction of the Merit Systems Protection Board. 5 U.S.C. §7513(d) and 5 U.S.C. §7701.

FINDINGS OR FACT AND CONCLUSIONS

The burden of proving the charges on which an adverse action is based rests with the agency taking such action and the agency decision must be supported by a preponderance of the evidence. 5 U.S.C. §7701(c)(1)(B); 5 C.F.R. §1201.56(a)(ii). This standard must be applied to every element of proof of the agency's case. See In re: William F. Van Sciver, 1 MSPB 94 (1979). The agency must establish that the actiin was taken for such cause as will promote the efficiency of the service and that the disciplinary sanctins imposed are for reasons relevant to this standard. Douglas v. Veterans Administration, MSPB Dkt. No. ATO75299006 (April 10, 1981). The appellants have the burden of proof with respect to any affirmative defenses described in 5 U.S.C. § 7701(c)(2). See 5 C.F.R. §1201.56(b).

Each appellant was advised in a written notice of his proposed removal, based on the following reasons:

Reason 1: Violation of 5 U.S.C. §7311 which states in pertinent part, "an individual may not accept or hold a position in the Government of the United States if he . . . particicpates in a strike against the Government of the United States . . . " and 18 U.S.C. §1918 which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.

Reason 2: Unauthorized absence.

In a specification set out under Reason 1, the agency noted tht beginning at approximately 7:00 a.m. EDT, on August 3, 1981, a nationwide strike by air traffic controllers occurred; noted the time and date each first failed to report for duty; and concluded that because each appellant had failed to report for his scheduled tour of duty or or after August 3, 1981, to the date of the notice, that employee participated in a strike against the United States.

In a specification set out under Reason 2, each ppellant was advised of the time and date his unauthorized absence commenced based on his failure to report for his scheduled tour of duty. The specification noted that each had been sent a notice thatn an illegal strike was in progress, and that he must return for duty; but that each failed to return to duty.2 The

Board has taken official notice (subject to refutation) of the fact that a strike called by the now decertified Professional Air Traffic Controllers Organization (PATCO) commenced on August 3, 1981, and continued through August 6, 1981, and that the strike was illegal. Ketchem v. Department of Transportation, MSPB Dkt. No. DAO75281F0713 (May 28, 1982).

In support of the charges concerning each appellant, the agency furnished copies of agency personnel logs, (facility sign-in sheets), assignment schedules and time and attendance reports reflecting, in pertinent part, for the period of August 3, 1981 through August 6, 1981, that each appellant was scheduled for a shift assignment or assignments during that period of time, but that each failed to report for his shift assignment.

The appellants have not refuted the fact of the strike as officially noticed by the Board in Ketchem, supra,. In light of the appellants' undisputed absneces from scheduled shft assignments during the period of August 3, 1981 through August 6, 1981, I find that such absences constitute prima facie evidence of the appellants' voluntary participation in the strike. Thus, the burden of persuasion now shifts to the appellants to rebut the agency's case by presenting evidence showing a lack of knowledge as to the existence of the strike or that their absence was due to some reason other than intentional participation in the strike. Schapansky v. Department of Transportation, MSPB Dkt. No. DAO75281F1130 (October 28, 1982).

The evidence as reflected in the testimony of the Chief of each facility, reveals that as a result of an August 3, 1981 announcement by President Reagan, striking employees were allowed to return to work if they reported for their first scheduled shift on or after 11:00 a.m. E.D.T. on August 5, 1981. the unrebutted evidence also shows that each appellant had been briefed, prior to the strike, that participation in a strike against the Government was illegal.

With respect to appellant Hugh A. Reynolds, the undisputed evidence reflects that August 3, 1981 was a regular day off (RDO) and that he had scheduled shift assignments on August 4 through 8, 1981. The appellant's deadline for reporting for work, based on the Presidential "amnesty", was August 5, 1981, at 2:00 p.m. Facility Chief William E. Branch testified that he observed the appellant picketing on August 4, 1981 (T.325). The appellant furnished no explanation for his August 4, and 5, 1981 absence to the agency or in his appeal to the Board. Thus, appellant Reynolds has not rebutted the agency's case.

With respect to appellant Thomas G. Perry, the undisputed evidence shows that August 3, 1981 was a regular day off and that he had scheduled shift assignments on August 4 through 8, 1981. Perry's deadline for reporting to work, based on the Presidential "amnesty", was 2:00 p.m. on August 5, 1981. Gerald W. Graham, Facility Chief at the time of the strike,

testified that his attempts to contact Perry on August 1 and 1, 1981, to ascertain Perry's future availability for work because of the anticipated strike, were unsuccessful; 3 tht Perry returned a call on August 3, 1981; that he told Perry that a strike had taken place and that Perry was needed at work; that because he was out of town, Perry advised that he was unavailable for work on August 3, 1981; and that he then asked Perry to be at work on August 4, 1981; and that he then asked Perry to be at work on August 4, 1981, at 7:00 a.m. Graham also testified that Perry again telephoned him at approximately 9:30 p.m. on August 3, 1981, inquiring about his status; that he advised Perry that he was considered AWOL on August 3, 1981 because he was not at work when needed; and that Perry then responded that he was "casting his lot with the union" because he felt the AWOL would result in a felony charge against him (T.413-414).

Graham added that they talked again on the evening of August 4, 1981; that they discussed the Presidential deadline; that he asked that the appellant not commit himself, notwithstanding the fact that he listed the safety precautions available for the appellant (T.414.415).

In his oral and written responses to the agency and in his initial appeal to the Board, the appellant furnished no explanation for his failure to report for scheduled shifts on August 4 and 5, 1981.

Although Graham did not dispel the appellant's concern about possible felony charges which was expressed during their second telephone conversation on August 3, 1981, I find that such does not justify the appellant's subsequent absences. This would be particularly true with respect to the appellant's August 5, 1981 absence because the undisputed evidence shows that during the evening of August 4, 1981, after the appellant had missed a shift assignment, Graham again talked with the appellant and notified him that he was needed at work for his August 5, 1981 shift assignment. Thus, the appellant was given clear notice that he could return to work on August 5, 1981, and was in fact, solicited to return on that date. Because the appellant did not or could not report, I find that he has not rebutted the agency's prima facie case.

The appellants argue that they considered themselves terminated as of 11:00 a.m. on August 5, 1981, based on the President's August 3, 1981 message. The appellants also claim that the agency was remiss in failing to notify them of an extended deadline to return to work as a result of the Presidential "amnesty" or that there was confusion concerning deadlines.

Any resporting deadline confusion by the appellants could have been avoided or resolved by reporting to or contacting the facility by 11:00 a.m., E.D.T. on August 5, 1981, if the appellants in fact perceived that to be their reporting deadline; however, neither of the appellants elected to

pursue such a course of action. While the agency may not have communicated to each appellant his specific deadline which was based on its liberal construction and application of President Reagan's 48-hour "amnesty", the agency was under no obligation to convey that information. Each appellant's absence was a matter of his individual choice. It was not the agency's responsibility to seek out and attempt to persuade each appellant to report for work. Thus, I find that if the appellanbs now contend that they failed to report for duty because of a confusion about a deadline, if there was in fact confusion, they did so as the result of their own irresponsibility and not the result of any agency nonfeasance.

Based on the appellants' established unauthorized absences and the prima facie case of strike participation which the appellants have not successfully rebutted, I find that the preponderance of the evidence supports the charges. Because the evidence discloses that one an employee missed his reporting deadline, the employee was not, or would not be permitted to return to duty, absent an acceptable excuse for being absent, I conclude that the chargeable unauthorized absence and strike participation extended only through the deadline for each employee.

The appellants contend that the agency committed certain procedural errors. An agency's decision may not be sustained if it is shown that harmful error in the application of the

agency's procedures at arriving at such a decision occurred. 5 U.S.C. § 7701(c)(2)(A). The burden is upon an appellant to establish, as an affirmative defense, that there was error and that it was harmful. Parker v. Defense Logistics Agencyl MSPB 489, 492 (1980). Harmful error is defined in the Board;s regulations at 5 C.F.R. § 1201.56(c)(3) as "error which might have caused the agency to reach a conclusion different than the one reached." In deciding whether such error rises to that standard, the Board found that it is helpful to consider:

> whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency. However, stated, the decisice factors are the closeness of the agency's decision, the centrality of the issue affected by the error, and any steps taken to mitigate the effect of the error." Id. at 493.

The appellants first claim that they were improperly denied 30 days' advance notice of the proposed removal actions. The law provides that an employee against an action is proposed it entitled to at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which as sentence of imprisonment may be imposed. 5 U.S.C. § 7513(b)(1). Because 18 U.S.C. § 1918 provides that

participation in a strike against the United States Government is a felony, punishable by up to one year of imprisonment, and becuase the appellants were absent without authorization or notice from work during the strike, the agency had reasonable cause to believe the appellants had committed a crime for which a sentence of imprisonment might be imposed. Thus, the agency's invocation of 5 U.S.C. § 7513(b)(1) was justified and I find no error with respect to this matter. Schapansky, supra, at 8.

The appellants furnished no evidence in support of their claim that statutes prohibiting strikes by federal employees are unconstitutional and the Board has concluded otherwise. Ketchem, supra, at 5, with pertinent case law citations at footnote 12.

The appellants also contend that they were improperly denied a minimum of seven days in which to orally respond to the charges. An employee against whom an adverse action is proposed is entitled to a reasonable time, but not less than seven days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer. 5 U.S.C. § 7513(b)(2).

The evidence reflects that at his request, appellant Perry made his oral response on August 4, 1981, the day after he received his certified mail copy of the notice of proposal removal. Thus, Perry's claim of error regarding the time in which to respond is without merit.

A review ofr the record reveals that in appellant Reynolds' case, the oral response was heard by the agency official on the seventh day after receipt of the notice of proposed removal. In Parker, supra, at 492, the Board, in keeping with Congressional intent as to when procedural error is to be considered to be reversible error, found that the statute clearly places upon the appellant the burden of establishing as an affirmative defense that the agency committed procedural error and that the error was harmful.

In Ratley v. Department of the Army, MSPB Dkt. No. ATO7528110338 at 5, (September 17, 1982), the Board held as follows:

> Because 5 U.S.C. § 7513(b)(2) provides that an employee must have at least 7 days to respond to an agency charge, any shorter period of time is inherently unreasonable and violates the requirements mandated by statute and is thus not in accordance with law. (footnote omitted).

Ratley can be read as holding that less than seven days to reply to an advance notice is per se harmful procedural error because seven days is mandated by law. Upon examination of the law and Board Orders, however, Ratley, stands as inconsistent. Nowhere in the law are procedural errors reversible errors because they are "not in accordance with the law."

It is the agency's decision to take disciplinary action that cannot be sustained by the Board if it is not in accordance with law. 5 U.S.C. § 7701(c)(2)(C). Within that same section of the statute, Congress provides that agency decisions cannot be sustained if the appellant shows harmful errors in procedures used to effect the action. 5 U.S.C. § 7701(c)(2)(A). If errors in procedures mandated by statute are considered harmful per se, absurd results could ensue. For example, when an agency does not give an employee specific reasons for an imposed disciplinary action, but the record shows that the appellant was aware of the reasons for the discipline, or if an agency gives an employee only 29 days rather than the statutorily mandated 30 days' advance notice. Cf. Cade V. U. S. Postal Service, MSPB Dkt. No. SFO7528010370 (November 30, 1981) (the Board found that a failure to afford the appellant the full period of time required is not reversible error absent a showing of harmful error by the appellant); Gallego v. Department of the Navy, MSPB Dkt. NO. SFO7528110759 (July 21, 1982) (shortening the notice period by seven days was error but that it did not warrant reversal of the removal action under 5 U.S.C. § 7701(c)(2)(A0.

While the appellants plead harmful error with respect to the fact they received less than seven full days to make an oral reply, they have not shown harm. Accordingly, I find that any shortened oral response period had no effect on the agency decision and, therefore, conclude that such does not constitute harmful error.

The next claim of harnful error made by the appellants is that they were unlawfully suspended during the pendency of the removal actions. The agency acknowledged that the appellants were placed on a non-duty and non-pay status during the notice period.

A "suspension" is defined as the placing of an employee in a temporary status without duties and pay for disciplinary reasons. 5 U.S.C. §§ 7501(2) and 7511(2). It is apparent tha the agency considered it contrary to its best interest to return the appellants to a duty statut during the notice period. However, the agency has offered no explanation for failing to retain the appellants in a pay status. A suspension of more than 14 days must be taken in accordance with te procedures set out in 5 U.S.C. § 7513 which includes, inter alia, an advance written notice and a right to reply to the proposed action. It is clear from the record that the agency did not furnish the appellants with a notice of proposed suspension nor furnish the appellants with an opportunity to reply thereto. Accordingly, I find that the agency's de facto supension actions were effected, without regard for the requirements of 5 U.S.C. § 7513 and, therefore, cannot be sustained. 4 See Cuellar v. U. S. Postal Service, MSPB Dkt. No. SFO75299045 (NOvember 13, 1981).

The appellants also contest the fact that they were denied requests for extensions of time in which to provide

their responses to the proposed removal actions, but provided only speculation of harmful error in that regard. Thus, the appellants have failed to carry the burden of proof with respect to the claim of harmful error in connection with that matter. Nevertheless, on my review of the record, the claims made by the appellants, and the circumstances wherein the majority or a substantial number of each facility's workforce was absent from scheduled shifts, I find that the appellants were afforded a reasonable time to review the material relied on to support the proposed removals and to respond to the proposed actions. Accordingly, I find no error with respect to the agency's decision to deny these requests for time extensions.

The appellants also claim harmful error based on the fact that their requests for certain documentary material, during and after their oral presentations, was not then provided. However, the appellants have not shown how tht material, some of which had been previously furnished or made available and some of which was subsequently obtained through discovery proceedings, would have had any effect on the agency decision. Accordingly, I find no error with respect to this matter. Even if it was error, it is not shown to be harmful.

The appellants next claim that the agency evidence concerning the charges, should have been limited, at the hearing, to that material and evidence provided prior to the hearing.

A proceeding before the Board is a de novo proceeding, and the Board may consider all the relevant evidence presented by both parties. Nothing in the law or in the Board's regulations restricts an agency to reliance upon its documentary administrative record. Ziess v. Veterans Administratin, MSPB Dkt. No. NYO75209017 (September 1, 1981). See also Chavez v. Office of Personnel Management, MSPB Dkt. No. DA831L09003 at 13-14 (May 28, 1981). Thus, contrary to the appellants' claim, the agency evidence of picketing activity, PATCO membership, and strike support activities constituted admissible evidence relating to strike aprticipation.

The appellants also contend that the removal actins were pre-determined as the result of statements by public officials, including President Reagan, that strikers would be fired. However, the evidence shows that each appellant was afforded the opportunity to respond to the charges against him, but that neither furnished any explanation for his absences. The evidence, as reflected by the testimony of each facility chief reveals that individual consideration was given to each appellant's case and that each facility chief had the authority to decide eash case based on individual circumstances. Thus, the appellants' assertion that the actions were pre-determined is not supported by the evidence presented.

The appellants contend that the agency actions against them constituted a prohibited personnel practice,

specifically claiming that they were treated unequally when certain employees were allowed to return to work, because of varying deadlines. However, the appellants have not pointed out any instance where similarly situated employees at their respective facilities were treated differently; i.e., there is no evidence showing that any employees not taking advantage of the Presidential "amnesty" were allowed to return to work. Thus, the appellants have failed to show unequal or disparate treatment.

Contrary to the appellants' claim, the evidence presented does not reveal the removal actions were a violation of the Merit Systems principles set out in 5 U.S.C. § 2301. Any failure of the agency to consider appellants' work performance, ability, aptitude, and general qualifications, is of no consequence since those matters are irrelevant to the charges on which the removal actions were based. The appellants also claim that the removal actions were taken against them as repsial for their disclosure of violations of laws, rules, and regulations; misnamagement; gross waste of funds; abuse of authority; and substantial dnager to public safety. However, the evidence, as revealed in the testimony of agency officials, discloses the sole reasons for the removal actions were as set out in the letters of proposed removal, specifically, AWOL and strike participation. Accoringly, I find no merit in the appellants' claim of reprisal.

The appellants also claim that the agency prohibition against their reemployment with the agency and their inability to compete with others for employment, because of the stigma of their removal, constitutes a prohibited personnel practice; however, those matters are not subject to my review in this decision. Contrary to the appellants' assertion, I find that any subsequent settlement of appeals concerning other former air traffic controllers removed for striking and AWOL is irrelevant to the issues in the instant appeals.

Nexus may be presumed where there is a "clear and direct relationship" between such misconduct and both the "employees ability to accomplish his . . . duties satisfactorily" and "the agency's ability to fulfill its mission." Doe v. Hampton, 566 F.2d 265, 272, n. 20 (D.C. Cir. 1977); see also, Bonet v. U. S. Postal Service, 661 F.2d 1071, 1078 (5th Cir. 1981).

Because of the intentional disruptive effect of the strike on the agency mission, caused by the apellants' absences in support of a strike, I find no basis for mitigating the penalty for removal, notwithstanding the appellant's prior favorable employment record.

Removal of an air traffic controller for proven participation in a strike against the Federal government is an appropriate penalty and promotes the efficiency of the service. Johnson v. Department of Transportation, MSPB Dkt. No. DCO75281F0998 at 16 (November 10, 1982); Schapansky, supra, at

10-11. Since removal is found to be appropriate in these cases, it is unnecessary for me to determine the correctness of the agency's assertion that removal of a striking employee is mandated by statute.

DECISION

The removal actions are AFFIRMED. The agency is ORDERED to amend the records to show each appellant in a pay status from the date of the notice of proposed removal through the effective date of the removal action.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on March 1, 1983, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established tht:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed;

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. § 7703(b)(1), 5 the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U. S. Court of Appeals for the Federal Circuit, 717 Madison Place, N. W., Washington, D.C. 20005, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

S. F. Vesser
Presiding Official

FOOTNOTES

1. Appellant Hugh A. Reynolds was employed at Jackson, Mississippi, and appellant Thomas C. Perry was employed at West Memphis, Arkansas. Perry's appeal was appropriately submitted to the Board's Dallas Regional Office, but on motion of the appellant, venue was changed. The appeals of other appellants whose appeals were included in the consolidated hearing (Raymond E. Bader, et al. v. Department of Transporatation, Federal Aviation Administration) are addressed in separate decisions.

2. The appellants denied receiving the notice from the agency that a strike was in progress and the agency furnished no evidence showing that delivery of the notices was effected.

3. A message to return a telephone call was left with the appellant's wife on August 2, 1981.

4. Because the Board lacks jurisdiction over back pay issues, I make no finding with respect to that matter. See Ritchey v. U. S. Postal Service, MSPB Dkt. No. PHO752801054 (April 2, 1982). Pursuant to 31 U.S.C. § 71, back pay disputes are to be resolved by the Office of the Comptroller General.

5. As modified by § 127 of the Federal Cout Improvement Act of 1982, to be codified at 28 U.S.C. § 1209(a)(9).

No.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1986

P. M. BERGH, et al	*	Appeal No.
	*	85-1102
MILTON C.	*	Appeal No.
CROISSANT, et al	*	85-1103
LARRY L. JOHNSON,	*	Appeal No.
et al,	*	85-1106
JOHN C.HOLEN,	*	Appeal No.
et al	*	85-1108
MYRON L. THOMSON,	*	Appeal No.
et al	*	85-1240
JOHN W.KARR, et al,	*	Appeal No.
	*	85-1241
STUART F. ETTER,	*	Appeal No.
et al,	*	85-1242
MELVIN L.BEEBE,	*	Appeal No.
et al,	*	85-1243
WILLIAM C.	*	Appeal No.
JOHNSON, et al,	*	85-1245
	*	
v.	*	
	*	
DEPARTMENT OF	*	
TRANSPORTATION,FAA	*	
	*	
Respondent.	*	

DECIDED: July 2, 1986

Before FRIEDMAN, SMITH, and BISSELL, Circuit Judges, FRIEDMAN, Circuit Judge.

In this petition for review, former air traffic controllers challenge the decisions of the Merit Systems Protection Board (Board) upholding their removal by the Federal Aviation Administration (Administration) for participating in the illegal 1981 strike on various grounds. A major contention is that the Administration acted improperly by reinstating other controllers whom it also had removed for striking but not reinstating the petitioners. We reject the petitioners' challenges to the decisions of the Board and affirm them.

I.

Counsel for the petitioners requested oral arguments. We determined, however, that all but one of the issues the petitioners raised

have been authoritatively decided in our previous decisions, that the facts and legal arguments were adequately presented in the briefs and record, and that the decisional process woudl not have been aided by oral argument. Fed. R. App. P. 34(a). We heard oral argument on the issue whether the Administration acted improperly in reinstating some, but not all, of the fired controllers.

II.

A. the parties stipulated that "[t]he FAA nationwide has reinstated some air traffic controllers/appellants who were removed for participation in the [air traffic controllers] strike pursuant to settlement agreement." The petitioners argue that the agency "violated MSPB principles and fundamental fairness by reinstating

some controllers found guilty of striking, for no reason which can be discerned from the record." They cite Douglas v. Veterans Administration, 5 MSPR 280 (1981), and Woody v. General Services Administration, 6 MSPR 468 (1981), for the proposition that "where an appellant raises an allegation of disparate treatment in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld." Woody, 6 MSPR at 488 (citing Douglas, 5 MSPR at 306-07). The Petitioners assert that the agency "has provided no explanation, much less any evidence, as to why it vacated its findings and dismissed its charges against the reinstated controllers while denying petitioners this benefit."

Woody and Douglas, however, are inapposite because they deal solely with the question whether the penalty the agency selected was proper. The alleged disparate treatment here, however, does not involve any difference in the penalty imposed upon different employees -- all the air traffic controllers involved were removed -- but turns upon the propriety of the Administration's settling some of the cases before the Board by reinstating some controllers, and not explaining the reasons why it also did not enter into like settlements with the petitioners.

The agency has given the following explanation in its brief of the process by which, and the reasons why, it determiined to settle some of the cases but not those of the petitioners:

> The FAA conducted an in-depth analysis of each of the 11,000 cases of the removed air traffic controllers in preparation for the litigation before the MSPB. As part of the litigation strategy, the FAA undertook an analysis of the strengths and weaknesses of each case. Based on this individualized analysis, the agency made decisions to enter into settlement negotiations with certain air traffic controllers whose appeals were pending. As part of this analysis, the FAA also reviewed the individual cases of the petitioners and made individual determinations that settlement was not warranted in these cases. The agency embarked on the litigation analysis in order to best prepare its cases for hearings, not under any policy to settle cases. The cases selected for settlement were those whose examination demonstrated to the FAA that further litigation would not be successful.

We know of no principle that precludes the government from settling, upon whatever terms it deems suitable, cases in which it determines

that the likelihood of success is so low as to make continued litigation inappropriate. The decision whether to settle a particular case and upon what terms is a matter particularly within the discretion of the agency conducting the litigation. The agency was not required to give detailed reasons in each particular case concerning the facts that led it to settle rather than to litigate, as the petitioners apparently would require it to do. The agency's statement that based upon "an analysis of the strengths and weaknesses of each case", it decided not to conduct "further litigation" of those cases where the analysis indicated that such litigation "would not be successful", was a sufficient explanation for the settlements the government made.

The law favors settlement of

cases. United States v. Contra Costs County Water District, 678 F. 2d 90, 92 (9th Cir. 1982); Stotts v. Memphis Fire Department, 679 F. 2d 541, 565 (6th Cir. 1982); Airline Stewards & Stewardesses Association, Local 550, TWU, AFL-CIO v. American Airlines, 573 F.2d 960, 963 (7th Cir. 1978); Florida Trailer & Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960); Fed. R. Evid. 408 advisory committee note. The government is to be commended, not criticized, for deciding not to litigate those of the vast number of air traffic contoller cases pending before the Board in which it concluded that its likelihood of success was so small as to make continued litigation unwise.

B. The petitioners next contend that the Administration denied them equal protection because, due to

friendship or personal favoritism, Administration officials notified other air traffic controllers, but not the petitioners, of their deadline shift for reporting to work. They rely upon Olshock v. Village of Skokie, 411 F. Supp. 257 (N.D. 111), aff'd, 541 F.2d 1254 (7th Cir. 1976). In Olshock, during a police officers strike the Village of Skokie took an informal poll to determine which officers might return to work. Those who said they would do so were notified that if they reported by a specific date, they would not be discharged, but merely suspended. The court held that

> [t]he failure of defendants to give all the 59 striking policemen notice that they would not be discharged if they reported for duty in uniform on or prior to July 13, 1975, and the failure of defendants to give said

> notice to the plaintiffs herein, constituted a failure to provide equal protection of the laws to plaintiffs within the meaning of and as required by the Fourteenth Amendment to the United States Constitution . . . .

Id. at 265.

The rationale of Olshock was that the Village unfairly had discriminated against those officers who were not notified that if they reported by the deadline, they would not be discharged, in favor of those who were notified. In that situation, the non-notified officers were not aware of the deadline and the consequences of failing to meet it. The air traffic controllers, however, were in a quite different situation, for we have held that

> [e]ach petitioner knew when his next regularly scheduled shift commenced and elected

> not to show up at that time. Having disregarded the initial 48 hour moratorium, petitioners can hardly complain that they were not specifically and personally notified that each had an opportunity to also disregard an extension of that moratorium.

Adams v. Department of Transportation, FAA, 735 F.2d 488, 491 (Fed. Cir.), cert denied, 105 S. Ct. 432 (1984).

The petitioners argue, however, that even if the Administration was not required to notify all the air traffic controllers of their deadline shifts, it could not selectively notify some but not others. The petitioners point out that Mr. Helms, the administrator of the agency, issued a "directive" that supervisors should encourage their friends to come back to work.

The Helms statement, however, did not relate to notifying controllers of their deadline shifts, but only urged supervisors to encourage controllers with whom they were friendly to return to work. In his testimony Mr. Cox, a supervisor at one of the towers involved, explained the scope and purpose of the Helms statement:

> Q. Now in this telecon, Mr. Helms advised that he did not want supervisors to be calling controllers as supervisors, is that right?
>
> A. That was not a directive. He suggested that the Agency -- he said the Agency was not going to instruct supervisors to make calls as supervisors to their people.
>
> Q. So he said that as far as the Agency's position was concerned, as a supervisor you were not being directed to call --
>
> A. That's correct.
>
> Q. Controllers, is that correct? But he did say that the Agency was

suggesting that supervisors call controllers as personal friends?

A. I think that's a little liberal. My interpretation of what I heard was that if you felt, and if you were concerned about these people as friends -- he wasn't suggesting to call everybody as a friend. What he was saying is that if you had someone you were especially concerned about as a friend, that you could be influential with and answer questions, go ahead and give him a call.

C. The petitioners argue that the Administration "erroneously decided that 5 U.S.C. Section 7311 require[d] dismissal of any employee found guilty of striking." whereas that statute permitted the agency to impose a lesser penalty. We rejected a similar contention in Schapansky v. Department

of Transportation, FAA, 735 F.2d 477 (Fed. Cir.), cert denied, 105 S. Ct. 432 (1984), where we ruled that

> [w]hether removal is mandatory under 5 U.S.C. § 7311 or 18 U.S.C. § 1918 need not be here decided. Removal is permissible under those statutes and no statute prohibits removal of any who strike against the United States.

Id. at 485.

Similarly, in the present case we cannot find that the Administration abused its discretion or otherwise acted improperly in concluding that the appropriate penalty for the petitioners' illegally striking against the government was removal.

D. Two of the petitioners (Burkette, No. 85-1102, and Johnson, No. 85-1245) contend that their failure to report for work resulted

not from participating in the strike but because they were confused about their deadline shift for reporting. We have rejected similar claims in Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984); Adams v. Department of Transportation, FAA, 735 F.2d 488 (Fed. Cir), cert. denied, 105 S. Ct. 432 (1984); and Dorrance v. Department of Transportation, FAA, 735 F.2d 516 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984). For the reasons given in those opinions, we also reject the claim here.

The decisions of the merit Systems Protection Board upholding the removal of the petitioners are affirmed.

AFFIRMED

Supreme Court, U.S.
FILED
NOV 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-659

IN THE SUPREME COURT
OF THE UNITED STATES

HUGH A. REYNOLDS, AND THOMAS G. PERRY,

Petitioners,

V.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

SUPPLEMENTAL APPENDIX

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

R. E. BADER, et al *
*
Appellant, *
*
v. *
*
DEPARTMENT OF TRANS- *
PORTATION, FEDERAL *
AVIATION ADMINISTRATION, *
*
Agency. *

ORDER

By a motion received on December 3, 1982, the attorney for the above-referenced appellants requests that the record be re-opened for the development of evidence concerning several recent settlements of appeals from former Air Traffic Controllers who were removed as the result of the 1981 strike against the agency.

The matter of recent settlements not being relevant to the instant consolidated appeal, the motion is DENIED.

S. F. VESSER
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

IN THE MATTER OF:	*	
	*	
HUGH A. REYNOLDS,	*	
THOMAS C. PERRY,	*	
Appellants,	*	DECISION NUMBER:
	*	ATO75282F0674
v.	*	DECISION NUMBER:
	*	ATO75281F1471
DEPARTMENT OF	*	
TRANSPORTATION,	*	
FEDERAL AVIATION	*	
ADMINISTRATION,	*	
	*	
Agency.	*	

INTRODUCTION

By separate petitions, the appellants submitted timely appeals to the Regional Offices of the Merit Systems Protection Board. The appeals are from administrative actions taken by the Federal Aviation Administration (FAA) which resulted in the removal of each appellant from the position of Air Traffic Control Specialist at an Air Traffic Control Tower.

Because the issues are substantially the same, the appeals have been consolidated. 5 U.S.C. §7701(f)(1); 5 C.F.R. §1201.36(a)(1). Each appellant requested a hearing and a hearing on the consolidated appeals, which included the appeals of other former air traffic controllers, was held on October 18, 19, 20 and 21, 1982 at Memphis, Tennessee. [1]

JURISDICTION

At the time of the removal action, each appellant was an employee as defined by 5 U.S.C. §7511(a)(1)(A) and a removal is an action covered by 5 U.S.C. §7512. Accordingly, the appeals were accepted for adjudication on the basis that they are within the appellate jurisdiction of the Merit Systems Protection Board. 5 U.S.C. §7513(d) and 5 U.S.C. §7701.

FINDINGS OR FACT AND CONCLUSIONS

The burden of proving the charges on which an adverse action is based rests with the agency taking such action and the agency decision must be supported by a preponderance of the evidence. 5 U.S.C. §7701(c)(1)(B); 5 C.F.R. §1201.56(a)(ii). This standard must be applied to every element of proof of the agency's case. See In re: William F. Van Sciver, 1 MSPB 94 (1979). The agency must establish that the action was taken for such cause as will promote the efficiency of the service and that the disciplinary sanctins imposed are for reasons relevant to this standard. Douglas v. Veterans Administration, MSPB Dkt. No. ATO75299006 (April 10, 1981). The appellants have the burden

of proof with respect to any affirmative defenses described in 5 U.S.C. § 7701(c)(2). See 5 C.F.R. §1201.56(b).

Each appellant was advised in a written notice of his proposed removal, based on the following reasons:

> Reason 1: Violation of 5 U.S.C. §7311 which states in pertinent part, "an individual may not accept or hold a position in the Government of the United States if he . . . particicpates in a strike against the Government of the United States . . . " and 18 U.S.C. §1918 which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.
>
> Reason 2: Unauthorized absence.

In a specification set out under Reason 1, the agency noted tht

beginning at approximately 7:00 a.m. EDT, on August 3, 1981, a nationwide strike by air traffic controllers occurred; noted the time and date each first failed to report for duty; and concluded that because each appellant had failed to report for his scheduled tour of duty or or after August 3, 1981, to the date of the notice, that employee participated in a strike against the United States.

In a specification set out under Reason 2, each ppellant was advised of the time and date his unauthorized absence commenced based on his failure to report for his scheduled tour of duty. The specification noted that each had been sent a notice that an illegal strike was in progress, and that he must return for duty; but that each failed to return to duty.2 The

Board has taken official notice (subject to refutation) of the fact that a strike called by the now decertified Professional Air Traffic Controllers Organization (PATCO) commenced on August 3, 1981, and continued through August 6, 1981, and that the strike was illegal. Ketchem v. Department of Transportation, MSPB Dkt. No. DA075281F0713 (May 28, 1982).

In support of the charges concerning each appellant, the agency furnished copies of agency personnel logs, (facility sign-in sheets), assignment schedules and time and attendance reports reflecting, in pertinent part, for the period of August 3, 1981 through August 6, 1981, that each appellant was scheduled for a shift assignment or assignments during that period of time, but that each failed to report for his shift assignment.

The appellants have not refuted the fact of the strike as officially noticed by the Board in Ketchem, supra,. In light of the appellants' undisputed absences from scheduled shft assignments during the period of August 3, 1981 through August 6, 1981, I find that such absences constitute prima facie evidence of the appellants' voluntary participation in the strike. Thus, the burden of persuasion now shifts to the appellants to rebut the agency's case by presenting evidence showing a lack of knowledge as to the existence of the strike or that their absence was due to some reason other than intentional participation in the strike. Schapansky v. Department of Transportation, MSPB Dkt. No. DA075281F1130 (October 28, 1982).

The evidence as reflected in the testimony of the Chief of each facility, reveals that as a result of an August 3, 1981 announcement by President Reagan, striking employees were allowed to return to work if they reported for their first scheduled shift on or after 11:00 a.m. E.D.T. on August 5, 1981. the unrebutted evidence also shows that each appellant had been briefed, prior to the strike, that participation in a strike against the Government was illegal.

With respect to appellant Hugh A. Reynolds, the undisputed evidence reflects that August 3, 1981 was a regular day off (RDO) and that he had scheduled shift assignments on August

4 through 8, 1981. The appellant's deadline for reporting for work, based on the Presidential "amnesty", was August 5, 1981, at 2:00 p.m. Facility Chief William E. Branch testified that he observed the appellant picketing on August 4, 1981 (T.325). The appellant furnished no explanation for his August 4, and 5, 1981 absence to the agency or in his appeal to the Board. Thus, appellant Reynolds has not rebutted the agency's case.

With respect to appellant Thomas G. Perry, the undisputed evidence shows that August 3, 1981 was a regular day off and that he had scheduled shift assignments on August 4 through 8, 1981. Perry's deadline for reporting to work, based on the Presidential "amnesty", was 2:00 p.m. on August 5, 1981. Gerald W. Graham, Facility Chief at the time of the strike,

testified that his attempts to contact Perry on August 1 and 1, 1981, to ascertain Perry's future availability for work because of the anticipated strike, were unsuccessful; 3 tht Perry returned a call on August 3, 1981; that he told Perry that a strike had taken place and that Perry was needed at work; that because he was out of town, Perry advised that he was unavailable for work on August 3, 1981; and that he then asked Perry to be at work on August 4, 1981; and that he then asked Perry to be at work on August 4, 1981, at 7:00 a.m. Graham also testified that Perry again telephoned him at approximately 9:30 p.m. on August 3, 1981, inquiring about his status; that he advised Perry that he was considered AWOL on August 3, 1981 because he was not at work when needed; and that Perry then

responded that he was "casting his lot with the union" because he felt the AWOL would result in a felony charge against him (T.413-414).

Graham added that they talked again on the evening of August 4, 1981; that they discussed the Presidential deadline; that he asked that the appellant not commit himself, notwithstanding the fact that he listed the safety precautions available for the appellant (T.414.415).

In his oral and written responses to the agency and in his initial appeal to the Board, the appellant furnished no explanation for his failure to report for scheduled shifts on August 4 and 5, 1981.

Although Graham did not dispel the appellant's concern about possible felony charges which was expressed during their second telephone conversation on August 3, 1981, I find that such does not justify the appellant's subsequent absences. This would be particularly true with respect to the appellant's August 5, 1981 absence because the undisputed evidence shows that during the evening of August 4, 1981, after the appellant had missed a shift assignment, Graham again talked with the appellant and notified him that he was needed at work for his August 5, 1981 shift assignment. Thus, the appellant was given clear notice that he could return to work on August 5, 1981, and was in fact, solicited to return on that date. Because the appellant did

not or could not report, I find that he has not rebutted the agency's prima facie case.

The appellants argue that they considered themselves terminated as of 11:00 a.m. on August 5, 1981, based on the President's August 3, 1981 message. The appellants also claim that the agency was remiss in failing to notify them of an extended deadline to return to work as a result of the Presidential "amnesty" or that there was confusion concerning deadlines.

Any resporting deadline confusion by the appellants could have been avoided or resolved by reporting to or contacting the facility by 11:00 a.m., E.D.T. on August 5, 1981, if the appellants in fact perceived that to be their reporting deadline; however, neither of the appellants elected to

pursue such a course of action. While the agency may not have communicated to each appellant his specific deadline which was based on its liberal construction and application of President Reagan's 48-hour "amnesty", the agency was under no obligation to convey that information. Each appellant's absence was a matter of his individual choice. It was not the agency's responsibility to seek out and attempt to persuade each appellant to report for work. Thus, I find that if the appellanbs now contend that they failed to report for duty because of a confusion about a deadline, if there was in fact confusion, they did so as the result of their own irresponsibility and not the result of any agency nonfeasance.

Based on the appellants' established unauthorized absences and the prima facie case of strike participation which the appellants have not successfully rebutted, I find that the preponderance of the evidence supports the charges. Because the evidence discloses that one an employee missed his reporting deadline, the employee was not, or would not be permitted to return to duty, absent an acceptable excuse for being absent, I conclude that the chargeable unauthorized absence and strike participation extended only through the deadline for each employee.

The appellants contend that the agency committed certain procedural errors. An agency's decision may not be sustained if it is shown that harmful error in the application of the

agency's procedures at arriving at such a decision occurred. 5 U.S.C. § 7701(c)(2)(A). The burden is upon an appellant to establish, as an affirmative defense, that there was error and that it was harmful. Parker v. Defense Logistics Agency1 MSPB 489, 492 (1980). Harmful error is defined in the Board;s regulations at 5 C.F.R. § 1201.56(c)(3) as "error which might have caused the agency to reach a conclusion different than the one reached." In deciding whether such error rises to that standard, the Board found that it is helpful to consider:

> whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency. However, stated, the decisice factors are the closeness of the agency's decision, the centrality of the issue affected by the error, and

> any steps taken to mitigate the effect of the error." Id. at 493.

The appellants first claim that they were improperly denied 30 days' advance notice of the proposed removal actions. The law provides that an employee against an action is proposed it entitled to at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which as sentence of imprisonment may be imposed. 5 U.S.C. § 7513(b)(1). Because 18 U.S.C. § 1918 provides that

participation in a strike against the United States Government is a felony, punishable by up to one year of imprisonment, and becuase the appellants were absent without authorization or notice from work

during the strike, the agency had reasonable cause to believe the appellants had committed a crime for which a sentence of imprisonment might be imposed. Thus, the agency's invocation of 5 U.S.C. § 7513(b)(1) was justified and I find no error with respect to this matter. Schapansky, supra, at 8.

The appellants furnished no evidence in support of their claim that statutes prohibiting strikes by federal employees are unconstitutional and the Board has concluded otherwise. Ketchem, supra, at 5, with pertinent case law citations at footnote 12.

The appellants also contend that they were improperly denied a minimum of seven days in which to orally respond to the charges. An employee against

whom an adverse action is proposed is entitled to a reasonable time, but not less than seven days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer. 5 U.S.C. § 7513(b)(2).

The evidence reflects that at his request, appellant Perry made his oral response on August 4, 1981, the day after he received his certified mail copy of the notice of proposal removal. Thus, Perry's claim of error regarding the time in which to respond is without merit.

A review of the record reveals that in appellant Reynolds' case, the oral response was heard by the agency official on the seventh day after

receipt of the notice of proposed removal. In Parker, supra, at 492, the Board, in keeping with Congressional intent as to when procedural error is to be considered to be reversible error, found that the statute clearly places upon the appellant the burden of establishing as an affirmative defense that the agency committed procedural error and that the error was harmful.

In Ratley v. Department of the Army, MSPB Dkt. No. ATO7528110338 at 5, (September 17, 1982), the Board held as follows:

> Because 5 U.S.C. § 7513(b)(2) provides that an employee must have at least 7 days to respond to an agency charge, any shorter period of time is inherently unreasonable and violates the requirements mandated by statute and is thus not in accordance with law. (footnote omitted).

Ratley can be read as holding that less than seven days to reply to an advance notice is per se harmful procedural error because seven days is mandated by law. Upon examination of the law and Board Orders, however, Ratley, stands as inconsistent. Nowhere in the law are procedural errors reversible errors because they are "not in accordance with the law."

It is the agency's decision to take disciplinary action that cannot be sustained by the Board if it is not in accordance with law. 5 U.S.C. § 7701(c)(2)(C). Within that same section of the statute, Congress provides that agency decisions cannot be sustained if the appellant shows harmful errors in procedures used to effect the action. 5 U.S.C. §

7701(c)(2)(A). If errors in procedures mandated by statute are considered harmful per se, absurd results could ensue. For example, when an agency does not give an employee specific reasons for an imposed disciplinary action, but the record shows that the appellant was aware of the reasons for the discipline, or if an agency gives an employee only 29 days rather than the statutorily mandated 30 days' advance notice. Cf. Cade V. U. S. Postal Service, MSPB Dkt. No. SFO7528010370 (November 30, 1981) (the Board found that a failure to afford the appellant the full period of time required is not reversible error absent a showing of harmful error by the appellant); Gallego v. Department of the Navy, MSPB Dkt. NO. SFO7528110759 (July 21, 1982) (shortening the notice period by

seven days was error but that it did not warrant reversal of the removal action under 5 U.S.C. § 7701(c)(2)(A0.

While the appellants plead harmful error with respect to the fact they received less than seven full days to make an oral reply, they have not shown harm. Accordingly, I find that any shortened oral response period had no effect on the agency decision and, therefore, conclude that such does not constitute harmful error.

The next claim of harmful error made by the appellants is that hey were unlawfully suspended during the pendency of the removal actions. The agency acknowledged that the appellants were placed on a non-duty and non-pay status during the notice period.

A "suspension" is defined as the placing of an employee in a temporary status without duties and pay for disciplinary reasons. 5 U.S.C. §§ 7501(2) and 7511(2). It is apparent tha the agency considered it contrary to its best interest to return the appellants to a duty statut during the notice period. However, the agency has offered no explanation for failing to retain the appellants in a pay status. A suspension of more than 14 days must be taken in accordance with te procedures set out in 5 U.S.C. § 7513 which includes, inter alia, an advance written notice and a right to reply to the proposed action. It is clear from the record that the agency did not furnish the appellants with a notice of proposed suspension nor furnish the appellants with an

opportunity to reply thereto. Accordingly, I find that the agency's de facto supension actions were effected, without regard for the requirements of 5 U.S.C. § 7513 and, therefore, cannot be sustained. 4 See Cuellar v. U. S. Postal Service, MSPB Dkt. No. SF075299045 (November 13, 1981).

The appellants also contest the fact that they were denied requests for extensions of time in which to provide

their responses to the proposed removal actions, but provided only speculation of harmful error in that regard. Thus, the appellants have failed to carry the burden of proof with respect to the claim of harmful error in connection with that matter. Nevertheless, on my review of the

record, the claims made by the appellants, and the circumstances wherein the majority or a substantial number of each facility's workforce was absent from scheduled shifts, I find that the appellants were afforded a reasonable time to review the material relied on to support the proposed removals and to respond to the proposed actions. Accordingly, I find no error with respect to the agency's decision to deny these requests for time extensions.

The appellants also claim harmful error based on the fact that their requests for certain documentary material, during and after their oral presentations, was not then provided. However, the appellants have not shown how tht material, some of which had been previously furnished or made

available and some of which was subsequently obtained through discovery proceedings, would have had any effect on the agency decision. Accordingly, I find no error with respect to this matter. Even if it was error, it is not shown to be harmful.

The appellants next claim that the agency evidence concerning the charges, should have been limited, at the hearing, to that material and evidence provided prior to the hearing.

A proceeding before the Board is a de novo proceeding, and the Board may consider all the relevant evidence presented by both parties. Nothing in the law or in the Board's regulations restricts an agency to reliance upon

its documentary administrative record. Ziess v. Veterans Administratin, MSPB Dkt. No. NYO75209017 (September 1, 1981). See also Chavez v. Office of Personnel Management, MSPB Dkt. No. DA831L09003 at 13-14 (May 28, 1981). Thus, contrary to the appellants' claim, the agency evidence of picketing activity, PATCO membership, and strike support activities constituted admissible evidence relating to strike aprticipation.

The appellants also con'end that the removal actins were pre-determined as the result of statements by public officials, including President Reagan, that strikers would be fired. However, the evidence shows that each appellant was afforded the opportunity to respond to the charges against him,

but that neither furnished any explanation for his absences. The evidence, as reflected by the testimony of each facility chief reveals that individual consideration was given to each appellant's case and that each facility chief had the authority to decide eash case based on individual circumstances. Thus, the appellants' assertion that the actions were pre-determined is not supported by the evidence presented.

The appellants contend that the agency actions against them constituted a prohibited personnel practice,

specifically claiming that they were treated unequally when certain employees were allowed to return to work, because of varying deadlines. However, the appellants have not pointed out any instance where

similarly situated employees at their respective facilities were treated differently; i.e., there is no evidence showing that any employees not taking advantage of the Presidential "amnesty" were allowed to return to work. Thus, the appellants have failed to show unequal or disparate treatment.

Contrary to the appellants' claim, the evidence presented does not reveal the removal actions were a violation of the Merit Systems principles set out in 5 U.S.C. § 2301. Any failure of the agency to consider appellants' work performance, ability, aptitude, and general qualifications, is of no consequence since those matters are irrelevant to the charges on which the removal actions were based. The appellants also claim that the removal

actions were taken against them as repsial for their disclosure of violations of laws, rules, and regulations; misnamagement; gross waste of funds; abuse of authority; and substantial dnager to public safety. However, the evidence, as revealed in the testimony of agency officials, discloses the sole reasons for the removal actions were as set out in the letters of proposed removal, specifically, AWOL and strike participation. Accoringly, I find no merit in the appellants' claim of reprisal.

The appellants also claim that the agency prohibition against their reemployment with the agency and their inability to compete with others for employment, because of the stigma of

their removal, constitutes a prohibited personnel practice; however, those matters are not subject to my review in this decision. Contrary to the appellants' assertion, I find that any subsequent settlement of appeals concerning other former air traffic controllers removed for striking and AWOL is irrelevant to the issues in the instant appeals.

Nexus may be presumed where there is a "clear and direct relationship" between such misconduct and both the "employees ability to accomplish his . . . duties satisfactorily" and "the agency's ability to fulfill its mission." Doe v. Hampton, 566 F.2d 265, 272, n. 20 (D.C. Cir. 1977); see also, Bonet v. U. S. Postal Service, 661 F.2d 1071, 1078 (5th Cir. 1981).

Because of the intentional disruptive effect of the strike on the agency mission, caused by the apellants' absences in support of a strike, I find no basis for mitigating the penalty for removal, notwithstanding the appellant's prior favorable employment record.

Removal of an air traffic controller for proven participation in a strike against the Federal government is an appropriate penalty and promotes the efficiency of the service. Johnson v. Department of Transportation, MSPB Dkt. No. DC075281F0998 at 16 (November 10, 1982); Schapansky, supra, at 10-11. Since removal is found to be appropriate in these cases, it is unnecessary for me to determine the correctness of the agency's assertion that removal of a striking employee is

mandated by statute.

DECISION

The removal actions are AFFIRMED. The agency is ORDERED to amend the records to show each appellant in a pay status from the date of the notice of proposed removal through the effective date of the removal action.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on March 1, 1983, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems

Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed;

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. § 7703(b)(1), 5 the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U. S. Court of Appeals for the Federal Circuit, 717 Madison Place, N. W., Washington, D.C. 20005, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

S. F. Vesser
Presiding Official